

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

CASE NO. CC20/2020

In the matter between:

THE STATE

VS

MSIMELELO MPEYI

Accused No.1

AZOLA SHAI

Accused No.2

LINDIKHAYA KRATSHI

Accused No.3

REANETSE TSOSI

Accused No.4

NKOSISIVE JIKA

Accused No.6

CINGICEBO NGXAME

Accused No.7

JUDGMENT ON SENTNCE

JOLWANA J

[1] Accused nos. 1, 2, 3 and 4 have been convicted of kidnapping, robbery and the murder of Mr Sandile Ntloko on 26 September 2019. Accused nos. 6 and 7 have only been convicted of kidnapping and robbery in respect of the same incident. In respect of robbery and murder charges the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 were invoked by the State. This section prescribes a minimum sentence of 15 years and life imprisonment respectively for robbery and murder unless substantial and compelling circumstances are shown to exist which justify a departure from the prescribed minimum sentences.

[2] The principles that should be applied in considering whether substantial and compelling circumstances exist were set out as follows in *S v Malgas* 2001 (1) SACR 469 (SCA):

- A. Section 51 has limited but not eliminated the court's discretion in imposing sentence in respect of the offences referred to in Part 1 of Schedule 2 (or imprisonment for other prescribed periods for offences listed in other parts of schedule 2).
- B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- C. Unless there are and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
- D. The specified sentences are not to be departed from lightly or for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
- E. The Legislature has however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
- F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process."

[3] The facts are briefly that accused no.6 had accompanied the deceased to where Achumile was which was accused no.3's homestead. Accused no.3 joined the deceased, Achumile and accused no.6 in what the deceased intended to be a harmless date with Achumile and alcohol consumption at Impolo in the small town of

Sterkspruit. At some point he was subdued in his vehicle by accused no.6 and his friends with Achumile's acquiescence. He was eventually kidnapped and forced to reveal his bank card pin code. His money was transferred from his bank account to those of accused nos.1 and accused no.7 at the behest of accused no.6. He ended up being killed at a remote rocky place in Mokhesi. The following day the bulk of the balance remaining in his bank account in the sum of R5000.00 was withdrawn, using his bank card while he was lying dead with his head badly injured and fractured and having been stabbed in his chest. The offences committed in this matter are indeed very serious offences especially if regard is had to the condition in which the deceased's body was found.

[4] The legal representatives of the accused made submissions urging this Court to depart from the prescribed minimum sentences. In addition to the individual personal circumstances of each accused it was submitted on behalf of all the accused that alcohol consumption played a role in the actions of the accused which culminated in the serious criminal activities that ensued. Indeed the evidence in this matter makes it plain that the deceased was quite generous in buying alcohol. In fact some of the accused joined in on the understanding that alcohol consumption was going to be in the offing. The photo album in this matter depicts, in photo number 25, a few empty bottles of beer which were found inside the deceased's vehicle.

[5] At the time of the commission of the offences in 2019 the accused's ages ranged between 20 and 30 years old. They all have minor children. All of them were unemployed save for accused no.3 who was said to be working as a bricklayer while all the others were doing odd jobs here and there. All the accused are unmarried and none of them was said to be a care giver in respect of their children. Some of them only contributed financially to the upbringing of their minor children when they were

able to do so. Accused number 6 is also receiving treatment for tuberculosis. The personal circumstances of all the accused can fairly be described as being generally typifying those of the many young people in this country where the majority of them are unemployed and some of them end up abusing drugs and alcohol.

[6] Accused no.3 was 32 years old in 2019 when he committed these offences in this matter. He was convicted in 2012 for a drug related offence and sentenced to a fine of R1000.00 or three months imprisonment. In 2013 he paid an admission of guilt fine of R100.00 for another drug related offence. On 19 July 2016 he was convicted of housebreaking with intent to commit an offence. He was thereupon sentenced to 12 months imprisonment which was wholly suspended for 5 years on condition that he was not convicted of housebreaking committed during the period of suspension. While this history of accused no.3's brushes with the law indicates an inclination to break the law, the convictions are themselves not relevant for the purposes of determining the question of whether or not the prescribed minimum sentences should be departed from. The same applies to accused no.4 who paid an admission of guilt fine of R200.00 for a drug related offence in 2016. He was 25 years old when he committed these offences. The State proved no previous convictions for accused nos. 1, 2 and 7.

[7] On the other hand accused no.6 stands on a different footing when it comes to criminal conduct. In 2013 he was found guilty of rape and sentenced to 10 years imprisonment. This means that he was out on parole on a very serious offence when he committed the crimes for which he has been convicted in this matter. What this shows is accused no.6's unwillingness to comply with the society's rules for peaceful co-existence or continued disregard for the same. However, it is not without significance that when the question of what to do with the deceased was discussed at

Mokhesi he indicated that the deceased should not be killed. According to the evidence of accused no.7 accused no.6 also tried to stop accused nos. 1, 2, 3 and 4 from killing the deceased. It was submitted on his behalf that he was very sorry for the crimes he committed and that it was a situation that just went beyond what he had originally intended. His original intentions were to enjoy liquor with his friends for which the deceased would be paying. He was also very sorry for the life that was lost in this incident. He was prepared to accept any punishment meted out to him for the crimes for which he was convicted.

[8] Accused no. 7 was 26 years old when he committed these offences for which he must now be sentenced. An impassioned plea was made on behalf of accused no.7 by his legal representative pleading with this Court not to sentence him too heavily. It was pointed out that the crimes he committed must inevitably lead to a sentence of direct imprisonment but still that sentence should be blended with mercy. It was submitted that when the vehicle stopped at Mokhesi and the deceased was chased and assaulted he tried to intervene to stop his co-accused from killing him. Indeed the evidence in the main trial was that he tried to stop the other accused from harming the deceased. Furthermore, he also had no role in the deceased being tied with shoe laces. It should also be remembered that accused no.6 had made the suggestion that the deceased should just be tied with shoe laces instead of being killed after it had been suggested by accused no.3 that he should be killed because he knew them and he knew their homesteads.

[9] It was also submitted that accused no.7 had attended a traditional ceremony at his father's homestead and was on his way to his own homestead when he got a lift from the deceased's vehicle. When he heard that there was going to be liquor consumption he changed his mind about going home and decided to join the other accused who

were known to him for the possibility of free alcohol consumption. It was submitted that in making this error of judgment he was influenced by alcohol which he had consumed at his father's homestead and that he was ordinarily not a regular drinker. This led to his involvement in the crimes that were committed. However, in this Court's search for the truth about what happened he played a significant role in closing whatever gaps were there in the evidence of Achumile and in some instances corroborated her evidence in disclosing the roles played by his co-accused in the murder of the deceased. He had also testified about what he discussed with some of his co-accused after they were arrested all of which contributed significantly in this Court knowing more about what happened in this matter.

[10] In 2018 he got a job in Mpumalanga province where he earned R5600.00. He used his earnings to support his family. Unfortunately, he lost that job in 2019. He was preparing to do a learner's licence at the time of this incident in order to obtain a driver's licence. He also did grass cutting from which he earned about R200.00 a day when he got a job and used the money to support his mother who is frail and diabetic and also has high blood pressure. Before his arrest he would take his mother to the doctors and generally looked after her. He is a first offender and only got involved in these crimes because of the possibility of free alcohol and he never foresaw that there would be criminal activities. After these offences were committed and he heard that police were looking for him he could have run away to Mpumalanga. However, he handed himself to the police.

[11] On the evidence led during trial it is apparent that the accused initially got involved in this matter because they were looking forward to getting free alcohol as against planning to commit the offences. It is indeed so that the deceased did generously provide free alcohol to these men all of whom he did not know save for accused no.6.

His relationship with accused no.6 and where they met remains unknown because accused no.6 decided not to testify. It is unclear if the deceased and accused no.6 knew each other even though they arrived together at the home of accused no.3 where they were looking for Achumile. That the deceased ended up lying dead at the hands of some of the accused to whom he had provided free alcohol is bewildering.

[12] Mr Mhlabunzima Ntloko who is the brother of the deceased testified in aggravation of sentence. From his evidence it is clear that the deceased was a pillar of the community at large. He was an educator teaching maths and physics. He would invite learners to his home and give them extra lessons for free in these subjects that tend to be very difficult for learners. The deceased was married with four children, three of whom went up to grade 12 and the last born dropped out of school after his father's death. The businesses of the deceased closed down because there was no one to run them. On Mr Ntloko's evidence it is not only the Ntloko family to whom the deceased was a uniting figure but also the whole community has suffered. The deceased's businesses provided employment to four members of the community who lost their jobs upon his death.

[13] The community of Macacuma where he lived during his lifetime and the society in general are without a doubt devastated and indignant about his brutal killing. Their anger is justified and their expectations that the accused be given stiffer sentences must be taken into account. These senseless murders have become the order of the day in this country. The Legislature passed the minimum sentence legislation in order to try and arrest this situation of violent crime that has spiralled out of control. The society is looking upon the courts to pass stiffer sentences for these violent crimes to send a clear message to all criminals and would be criminals out there that they will be dealt with severely by the courts.

[14] If one looks at the personal circumstances of all the accused, they are typical of the societal problems of broken families and in some instances absent fathers or fathers who play no role in raising their children. The spiralling unemployment of the youth who end up frequenting alcohol vending places like taverns is a well-known phenomenon. Some of these youths end up committing some of the serious crimes that have engulfed this country. All the accused have children who are minors. It does not appear that they played much of a role in the upbringing of their children. This is hardly surprising considering the fact that they were mostly all unemployed when they committed these crimes. There is not much that can be said about the personal circumstances of the accused beyond the fact that they are mostly first offenders.

[15] However, as pointed out in *Director of Public Prosecutions, Kwa-Zulu Natal v P* 2006 (1) SACR 243 (SCA) at 250, the consideration of an appropriate sentence does not end only with the personal circumstances of the accused. In that case the court said:

“The so-called traditional approach to sentencing required (and still does) the sentencing court to consider the triad consisting of the crime, the offender and the interests of society. In the assessment of an appropriate sentences the court is required to have regard to the main purposes of punishment, namely the deterrent, preventive, reformative and the retributive aspects thereof. To these elements must be added the quality of mercy, as distinct from mere sympathy for the offender.”

[16] While the Ntloko family and the community of Macacuma would be justified in seeking the severest possible punishment for the accused who senselessly took away the life of a man of the calibre of Mr Sandile Ntloko our courts have been cautioned against deciding a sentence on the basis of the justified anger of the community. In *S v MM* 2013 (2) SACR 292 (SCA) the court explained the applicable principles as follows:

“...It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity.”

[17] Our courts have always emphasised the fact specific and individualistic nature of our sentencing regime and the centrality of what is referred to as the *Zinn* triad in our sentencing law. All the accused have spent just over two years awaiting trial in police custody. The delay in the commencement of the trial was not of the making of the accused. As was pointed out in *S v Dlamini* 2012 (2) SACR 1 (SCA) the period of pre-sentence incarceration while an accused is awaiting trial is part of the considerations that must be taken into account as the court exercises its sentencing judicial discretion. In *Dlamini* this is how Cachalia JA expressed himself at paragraph 41:

“This brings me to the 10 months Mr Dlamini spent in custody before he was sentenced, which as I have mentioned, neither the magistrate nor the High Court took into account in deciding the appropriate sentence. It is trite that the period an accused is held in custody while awaiting completion of his trial should be taken into account when deciding on the appropriate sentence. This is done by making the period of imprisonment actually imposed shorter than it would otherwise have been”.

[18] Accused nos. 1, 2 and 7 were 22, 20 and 26 years old respectively in 2019 when these offences were committed. They are first time offenders while accused no.3's previous brushes with the law, at most attracted sentences that had an alternative of a fine or an admission of guilt fine while another sentence was wholly suspended on condition that he was not convicted of housebreaking committed during the period of

suspension. I consider it appropriate that even accused no. 3 and 4 should be regarded, for present purposes, as first offenders. Accused no.4 was 25 years old in 2019 when these offences were committed. He paid an admission of guilt fine for a drug related offence in 2016. In my view none of these previous brushes with the law must lead to the minimum sentences prescribed necessarily not being departed from.

[19] However, the same cannot be said about accused no.6. He had been released on parole when he committed the serious offences for which he has been convicted in this matter. In September 2013 he was convicted and sentenced to 10 years imprisonment for a rape offence. In September 2019, before the 10 year period had elapsed he abused the parole system which allowed for his release before he had completed his sentence and committed these offences for which he must now be sentenced. He clearly did not learn any lessons from the period he served in prison for rape. This in my view, must be taken into account in the consideration of an appropriate sentence for him. To his credit through, he was not convicted on the murder charge in this matter. In fact, the evidence in the main trial was to the effect that he and accused no.7 did try to prevent the killing of the deceased as I said before.

[20] Accused no.7 is also a first offender. He not only tried to stop the assault on the deceased, he played a very significant role with his evidence and therefore assisting this Court in knowing more about the truth inter alia, about what happened to Mr Ntloko and more importantly, who killed him. On the other hand accused nos.1, 2, 3 and 4 were bent on misleading this Court and tried to shield themselves from accounting for the killing of Mr Sandile Ntloko by resorting to obfuscation and downright lies. Now that the truth is known with the evidence of the section 204 witness and the evidence of accused no.7, accused nos. 1, 2, 3 and 4 must be given harsher sentences and be made to account for the crimes especially for Mr Ntloko's life.

[21] However, a departure from the prescribed minimum sentences is justified in my view. The whole history of this matter and the entire factual matrix points to all the accused mostly having been or deciding to join the others for alcohol consumption for which the deceased was prepared to pay. On the other hand accused no.3 was invited by the 204 witness. Accused no.3 and Achumile stayed together after all and she was being taken out on a date by the deceased. Accused no.4 was also invited by accused no.6 and fetched from his home where he and accused no.2 were sleeping. They both decided to go with accused no.6. Accused no.7 was picked up at a hiking spot on his way home that night. He alighted at his bus stop which incidentally, was where accused no.1 was going to be picked up. Accused no.1 had also been phoned by accused no.6 to join the group. The initial intention appears to have been to get free liquor at the expense of the deceased with Achumile being the bait. Another interesting irony is that accused no.1 was Achumile's boyfriend.

[22] At some point they decided to kidnap and rob the deceased. Alcohol or at least the desire to have it for free clearly played a role in the decisions they made which had tragic consequences. It is highly regrettable that a human life, particularly that of a man such as the deceased who was described by Mr Ntloko as having played a role in uplifting his family and the community at large in various ways. However, I find that all the circumstances referred to above are some of the substantial and compelling circumstances which ought to be taken into account. The prescribed minimum sentences would be disproportionate and therefore inappropriate for the circumstances in which these offences were committed. All the accused including those who have had some brushes with the law save for accused no.6 can fairly and properly be described as first offenders. They have already spent more than two years in pre-sentence incarceration while awaiting trial. All of them were in their homes on

the night in question when accused no.6 came knocking or called. The deceased had come to see Achumile with whom he was interested in a love relationship. He did not object when Achumile came along with her cousin accused no.3, joining him and accused no.6. At this early stage of that evening all concerned were looking forward to the night of fun and drinks at Impolo for which the deceased was evidently happy to pay. There was not, on the evidence, the slightest indication that violence might be visited upon the deceased at that stage.

[23] As I indicated in the main judgment at some point things escalated and ultimately the deceased was lying dead at Mokhesi. Accused no.6 might have, at some point, conceived an idea for the deceased to be robbed which he implemented with the help of his friends, and co-accused. That would not have included the deceased being murdered. In fact he tried to stop the others from going ahead with it on at least two occasions. The first one was when there was a brief discussion on what to do with the deceased after it was known that there was a search party for him involving the police. On this occasion he came up with the idea of the deceased being tied with shoe laces so that if he went to the police they would account for robbing him and not for his murder. It appears that they might have panicked when the deceased tried to run away to save his life after prison language was spoken. The second one was when he and accused no.7 tried to dissuade their co-accused from assaulting the deceased. It is also not without significance that the prosecutor in this matter also expressed a view which was in support of the notion that the facts of this matter do justify a departure from the prescribed minimum sentences. In doing so he essentially agreed with the submissions made on behalf of the accused which was that substantial and compelling circumstances do exist in this matter and that the prescribed minimum sentences are therefore inappropriate.

I have therefore come to the conclusion that the prescribed minimum sentences are inappropriate for the personal circumstances of the accused and the circumstances in which the crimes were committed.

[24] In the result the accused are sentenced as follows:

1. All the accused are sentenced to 5 years imprisonment in respect of count 1, kidnapping.
2. Accused nos. 1, 2, 3 and 4 are sentenced to 10 years imprisonment in respect of count 2, robbery with aggravating circumstances.
3. Accused no.6 is sentenced to 10 years imprisonment in respect of count 2 robbery with aggravating circumstances.
4. Accused no.7 is sentenced to 10 years imprisonment in respect of count 2, robbery with aggravating circumstances, five years of which is suspended for five years on condition that he is not convicted of the offence of robbery committed during the period of suspension.
5. Accused no.1, 2, 3 and 4 are sentenced to 25 years imprisonment each, five years of which is suspended for five years on condition that they are not convicted of murder committed during the period of suspension.
6. The sentences referred to in 1 and 2 above are ordered to run concurrently with the sentences referred to in 3, 4 and 5 above.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State : L. POMOLO

Instructed by : NPA

UMTATA

Legal representative for accused nos. 1 & 4: A. NOHIYA

Instructed by : Legal Aid South Africa

UMTATA

Legal representative for accused nos. 2 & 3: B. KREWU

Instructed by : Legal Aid South Africa

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Legal representative for accused no.6: V. NTSHANGASE

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UMTATA

Legal representative for accused no.7: Z. NOMLALA

Instructed by : Legal Aid South Africa

UMTATA

Date heard : 17 November 2021

Delivered on : 26 November 2021